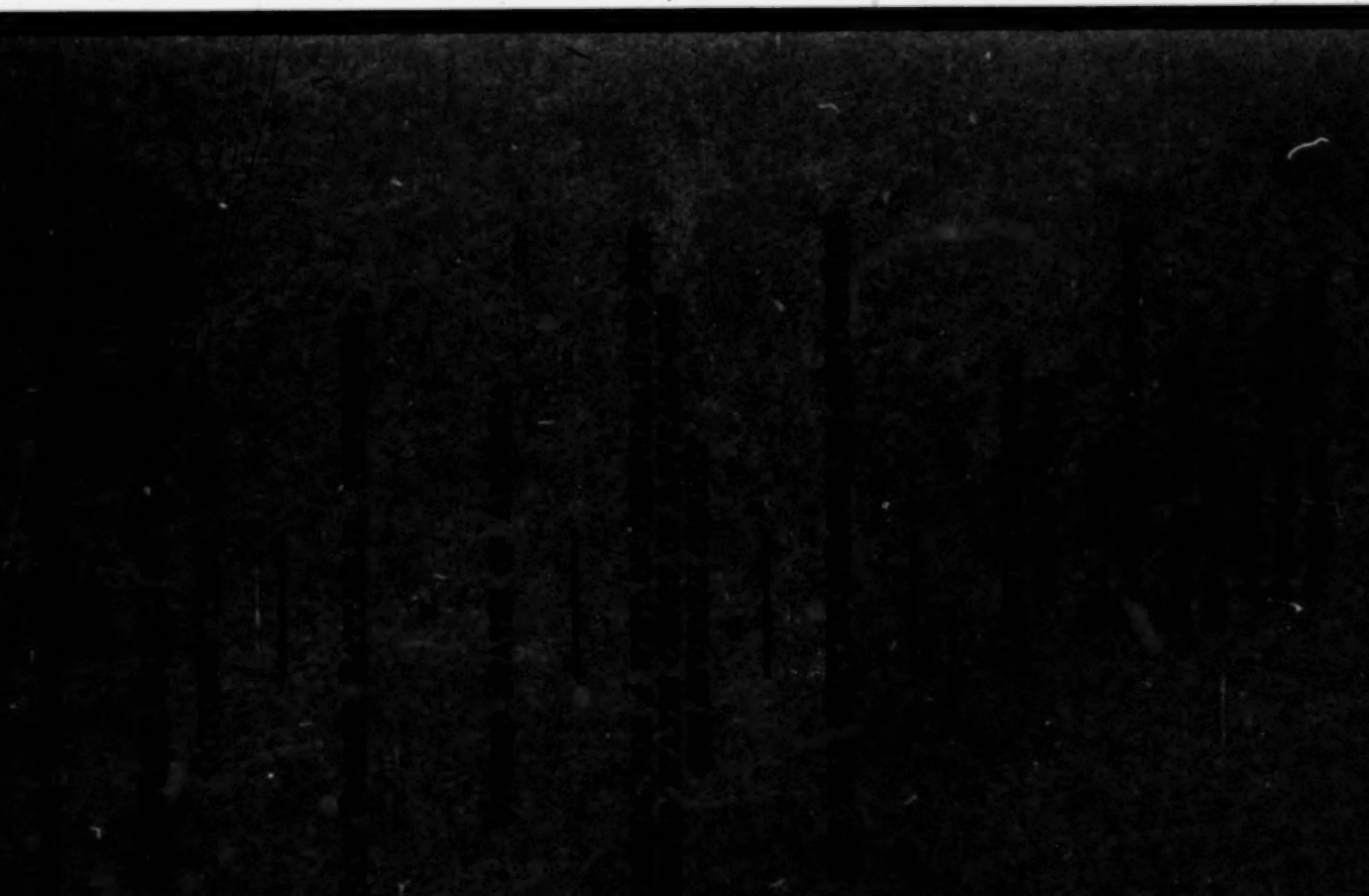

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 202

SAM JOSEPH BATTAGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals (Pet. App. 1-10, 11-12) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1969. A petition for rehearing was denied on May 7, 1969. The petition for a writ of certiorari was filed on June 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether petitioner's prosecution represents a proper, discretionary effectuation of the Selective Service laws.

3. Whether, in the instant circumstances, the trial court properly received petitioner's admissions to the arresting officers into evidence.

4. Whether the government illegally suppressed evidence against petitioner.

5. Whether petitioner has standing to challenge the constitutionality of the Selective Service Act on the ground that American involvement in the Vietnam conflict is unlawful.

STATEMENT

After a jury-waived trial, petitioner was convicted in the United States District Court for the Northern District of Illinois of making a false statement to his Selective Service board (Count 1), and of failing to notify his board that his marriage had been dissolved (Count 3), in violation of 50 U.S.C. App. 462. On February 7, 1968, he was sentenced to concurrent terms of two years' imprisonment, in lieu of a vacated prior sentence of four years' imprisonment imposed on November 29, 1967.

The evidence showed that on February 25, 1964, petitioner, then twenty years of age (4 R. 86),[1] returned

[1] "R." preceded by a volume number refers to the five-volume record that we are presently lodging with the Clerk

a current questionnaire (Govt. Exh. 2a) to his local board (4 R. 32).[1] The questionnaire, signed by petitioner (R. 32, 48), indicated that he was living with his wife and two children at an address in Melrose Park, Illinois (4 R. 47, 88, 319; Govt. Exh. 2a). As a result, petitioner was classified III-A (dependency deferment) (4 R. 22, 33, 40, 48-49). A III-A classification is proper if a registrant maintains a bona fide parent-child relationship with his children. If such relationship does not exist, then a III-A classification is proper only if the children are dependent upon the registrant for support (4 R. 50-53).

A former friend of petitioner, Miss Preston, testified that starting in early 1963 she commenced seeing petitioner "just about every night" (4 R. 280). In October 1963, she visited petitioner's Melrose Park apartment and had a conversation with his wife (4 R. 281). Soon afterwards, petitioner told Miss Preston that subsequent to this conversation, his wife had left him (4 R. 281-285). Petitioner later told Miss Preston that he was living with his mother in Oak Park (4 R. 286, 292, 294), or at various apartments other than the one he had shared with his wife and children (4 R. 292-296). In February or March 1964, petitioner told her he did not support his children, but that his father supported them (4 R. 304-

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of this Court. The first three volumes are pre-trial and post-trial transcripts, volume 4 is the trial transcript, while volume 5 is the record proper. The original exhibits are also being lodged.

307). Miss Preston testified that in 1966 she had asked petitioner why he had not been drafted and that petitioner had told her that "the Draft Board didn't know that he wasn't married, they still thought he was married" (4 R. 297).

A neighbor at the Melrose Park address where petitioner had resided with his wife and children stated that he had moved out of the apartment in the fall of 1963, but that his wife and children continued to reside there (4 R. 271-273). Before petitioner's departure, she had seen him "every other day or so," but thereafter she did not see him or his car (4 R. 275-276).

Petitioner and his wife were divorced in November 1964 (4 R. 114; Gov't Exh. 3). In 1966, when petitioner returned a current information questionnaire to his draft board, he indicated that he had contracted a 1966 marriage and that his children lived with him (Govt. Exh. 2b).

Two of the F.B.I. agents who arrested petitioner in May 1966 informed him of the nature of the charge, a Selective Service violation, and of his rights against self-incrimination (4 R. 178-179). They then asked him questions concerning his marital and Selective Service status. Petitioner replied that he had separated from his wife about November 1963, and had started living with his parents in Oak Park while his wife continued to live at the address in Melrose Park (4 R. 185, 190). He said that his divorce became final in November 1964, and that he did not believe he had advised the draft board of his divorce from his former wife (4 R. 182).

ARGUMENT

1. Petitioner attacks the sufficiency of the evidence as to the falsity of his statement that in February 1964 he was living with his wife and children (Pet. 21-25). However, uncontradicted evidence that showed the falsity came from petitioner's former neighbor, his former girl friend (Miss Preston), and from petitioner's own admissions to the F.B.I. The issue raised by the testimony was largely one of credibility to be determined by the trier of the facts. *E.g.*, *Hawk* v. *Olson*, 326 U.S. 271, 279. In the instant case, the evidence from each of the three sources tended to corroborate the information furnished by the others. It permitted the trial court to conclude that after Miss Preston, in late 1963, spoke with petitioner's wife, petitioner and his wife became estranged, and that petitioner had moved from the Melrose Park apartment prior to the time he filed his questionnaire with his local board in February 1964. The trial court was warranted in concluding that petitioner's claim of residence with his wife and children was willfully and knowingly false, and made in the expectation that it would avoid reclassification (4 R. 50-51, 304-307).

Petitioner attacks Count 3 on the basis of vagueness, arguing that he had no way of knowing that a divorce "*might*" change his draft status (Pet. 25-26). The underlying regulation (32 C.F.R. 1625.1; Pet. App. 4) requires each registrant, within ten days of the occurrence, to report to the local board any fact that might result in the registrant being

placed in a different classification. It gives as an example, "any change in his * * * marital * * * status" *(ibid.)*. Clearly, then, whatever may be said of other facts which might cause some uncertainty or confusion for a registrant, as to changes in marital status the language used in the regulation lacked neither clarity nor precision. See *Cameron* v. *Johnson*, 390 U.S. 611, 616. Petitioner obviously knew that his divorce had to be reported to Selective Service officials. In speaking to Miss Preston in 1966, he attributed his civilian status to the fact that his draft board had not learned of his 1964 divorce (4 R. 297).

2. Petitioner asserts that his prosecution was undertaken in bad faith because of his father's gangland connections (Pet. 26-32). He asserts that this is shown by the fact that he was prosecuted even though, at the time of his arrest in 1966, he offered to enter the military service voluntarily. He asserts that the refusal to allow him to do so, in lieu of criminal prosecution, is contrary to a tacit government policy as set forth in the government's brief in *Wallace* v. *United States* in the Fifth Circuit (Pet. 28-29). As there stated, however, prosecutions have been dismissed where defendants are willing to be inducted "if the violation was not flagrant." Affirmative acts of misrepresentation, such as are involved here, are regarded as flagrant violations. Where that is the situation, it is not the policy of the Department of Justice to refrain from prosecutions or to

dismiss a prosecution because of a defendant's willingness to submit to induction.[2]

3. Petitioner's principal contention[3] regarding the admissions he made to the agents appears to be that since the government failed to negate the possibility that petitioner wanted counsel present when interviewed, it was error to allow the admissions into evidence (Pet. 32-35). At trial, defense counsel requested a hearing concerning the presence of counsel, and one was held (4 R. 176-182). The crucial issue for the trial court to determine was whether the words of the agents, in the context used and considering the age, background and intelligence of the defend-

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[2] While petitioner quotes a portion of the trial court's pre-trial comments regarding a supposed "vendetta" against him (Pet. 27), reference to the record indicates that this was intended only as an inquiry (1 R. 5). Petitioner's statement that the trial court recognized "the arbitrary, capricious, and discriminatory nature of the instant prosecution" (Pet. 27) attributes more to the judge than he said. After referring to the possibility of prosecution because of having a gangster father, the court immediately added that such relationship "has nothing to do with due process if there is in fact a falsification of the classification questionnaire in the first instance [in 1964]" (2 R. 11).

[3] Petitioner also attacks the failure to call the government agent who gave the warning to petitioner and his lack of "great detail" (Pet. 33). The fact that the agent who gave the warning did not testify concerning it did not detract from the sufficiency of the warning which another agent testified was given. Petitioner misreads the record when he states that Agent Dallman testified that Agent Kinzer gave only a limited explanation as to petitioner's rights. It was the description of the offense of which petitioner was suspected that was curtailed, not being as full as the complaint which led to the issuance of the arrest warrant (4 R. 212-213).

ant, imparted a clear, understandable and constitutionally adequate warning of his rights. *Coyote* v. *United States*, 380 F. 2d 305, 308 (C.A. 10), certiorari denied, 389 U.S. 992. Agent Dallman testified that Agent Kinzer told petitioner that he was under arrest, and that (4 R. 179)

> * * * he did not have to make any statement to us, that any statement he made could be used against him in court; he told him he had a right to consult with an attorney or consult with anybody else if he so desired prior to making a statement, and if he could not afford an attorney the could [sic] would appoint one for him.

This warning, given in May 1966, complies with that approved in June 1966 when this Court commended this F.B.I. warning as being worthy of emulation by state and local enforcement agencies. *Miranda* v. *Arizona*, 384 U.S. 436, 484-486; *United States* v. *Fisher*, 387 F. 2d 165, 169 (C.A. 2), certiorari denied, 390 U.S. 953. The warning served to tell petitioner that he could consult with counsel before he utterred a syllable to the F.B.I. agents. Clearly, if petitioner did not wish to consult with counsel before he answered questions, he did not wish one present when he did speak.[4] See *United States* v. *Vanterpool*, 394 F. 2d 697 (C.A. 2).

Petitioner's reliance on *Lathers* v. *United States*, 396 F. 2d 524 (C.A. 5) is misplaced (Pet. 34-35).

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[4] Petitioner is neither illiterate nor unintelligent. He has worked as an assistant plumber, bookkeeper, and collector (Pet. 25), and had acquired bank and credit references (4 R. 144-145).

Unlike in the present case, Lathers was not told that he could consult with an attorney prior to making a statement (see 396 F. 2d at 533). The import of the advice Lathers received was "only that a judge or commissioner somewhere down the line would appoint a lawyer for him if he so requested" (396 F. 2d at 535). All things considered, petitioner "was given full and timely warnings of his constitutional rights," as the court below concluded (Pet. App. 6); his admissions were thus properly received in evidence.

4. Petitioner complains of the electronic surveillance of his father [5] and contends he has the right to examine the logs relating to that surveillance. Since, however, petitioner himself was not overheard, the controlling decision is not *Alderman* v. *United States*, 394 U.S. 165, on which petitioner relies, but *Taglianetti* v. *United States*, 394 U.S. 316. In the latter case this Court held, with respect to electronic eavesdropping, that since the defendant "was entitled to see a transcript of his own conversations and nothing else" he "had no right to rummage in government files." In the instant case, there are no transcripts of any conversations of petitioner, and he is not entitled to see those pertaining to his father, transcripts which the court of appeals has examined *in camera* and found to be without any relevancy whatever to petitioner (Pet. App. 9).

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[5] Petitioner's father was prosecuted for a Hobbs Act violation. See *United States* v. *Battaglia*, 394 F. 2d 304 (C.A. 7).

Petitioner also claims that the agent's report of his oral statements after arrest should have been turned over before trial under Rule 16, F.R. Crim. P., as "written or recorded statements or confessions made by the defendant." In answer to petitioner's motion for discovery, the government formally stated its position that "oral statements of a defendant made to Government agents do not constitute 'written or recorded statements' as that phrase is used in Rule 16" (5 R. 46). The trial court thereafter denied the motion (5 R. 48). There was thus no suppression of the fact of the oral statements, but a refusal to turn them over before trial which has decisional support. *United States* v. *Elife*, 43 F.R.D. 23 (S.D. N.Y.). Moreover, under Rule 16, F.R. Crim. P., the question of whether evidence should be produced is committed to the discretion of the Court. *United States* v. *Jordan*, 399 F. 2d 610, 615 (C.A. 2), certiorari denied, 393 U.S. 1005. In any event, a hearing was held on the admissibility of the statements and the reports of the agents were turned over at trial under 18 U.S.C. 3500. Petitioner was in no way prejudiced by not obtaining the reports earlier.

5. Petitioner's allegation that the draft is unconstitutional because the Vietnam conflict constitutes an undeclared war provides no defense to a prosecution for knowingly making false statements to the draft board. See *Dennis* v. *United States*, 384 U.S. 855, 865-867. Moreover, petitioner lacks standing to make such a claim. See *United States* v. *Mitchell*, 369 F. 2d 323 (C.A. 2) certiorari denied, 386 U.S. 972. At all

events, it is not a contention on which petitioner is entitled to prevail on the merits. See, *e.g.*, *Luftig* v. *McNamara*, 373 F. 2d 664 (C.A. D.C.), certiorari denied, 387 U.S. 945; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A. D.C.), certiorari denied, 389 U.S. 934.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1969.

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